House Judiciary Subcommittee on the Constitution Legislative Hearing:
H. Res. 97 and the Appropriate Role of Foreign Judgments
in the Interpretation of American Law

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I thank the Committee for the opportunity to express my views on the appropriate role of foreign judgments in the interpretation of American law. I applaud House Resolution 97 and its declaration that:

> judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

There are many arguments in support of the Resolution, and I expect that Mr. Whelan and my colleague Professor Dinh will canvass them thoroughly. In addition, this Subcommittee held excellent hearings on this subject last year, and I largely agree with the learned testimony of Professors John O. McGinnis and Michael D. Ramsey at that hearing.[1] Without repeating what has already been said, I will limit myself to three basic comments. I hope to show, first, that the stakes are very high here, because the new trend of reliance on current foreign law undermines the bedrock principle of democratic self-governance. Second, I will discuss the separation of powers implications of directing a resolution regarding constitutional interpretation to the judiciary. And third, I will briefly explore whether Congress should also take up this same issue in the context of statutory interpretation.

I. Democratic Self-Governance

I begin with the last clause of the Resolution, which is a crucial exception to the rule. The Resolution declares that foreign sources should not be used to interpret the U.S. Constitution "unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States."

This clause implicitly endorses a particular theory of constitutional interpretation. It does so in two words: "original meaning." The Resolution reminds us that the project of interpreting the Constitution involves discerning what its text would have meant to a reasonable reader *at the time of its ratification*.

[1] *See Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 108th Cong. (2004).

As the Resolution recognizes, foreign sources may be relevant to that project. It may well be appropriate to look to Blackstone, or to pre-constitutional British statutes or judgments, because these sources may have been known to readers at the time of the ratification, and they may reflect the way in which legal terms of art were used at that time. The Resolution wisely allows this uncontroversial use of foreign sources, to inform the original meaning of the Constitution.

But the new and disturbing trend at the Court has nothing to do with original meaning. The Court has taken to citing not Blackstone or Coke but *contemporary* foreign law.[2] As a matter of logic, these bodies of law are irrelevant to the original meaning of our constitutional text, not merely because they are foreign, and not merely because they are written to construe entirely different legal texts, but also because they are contemporary.

And this brings me to my first point. The current predilection for using contemporary foreign law to interpret the U.S. Constitution necessarily entails a rejection of the quest for *original* meaning. Simply put, those who would cite contemporary foreign law necessarily embrace the notion of an *evolving* Constitution.[3] Justice O'Connor sees this connection and, unfortunately, she has sometimes exemplified this point. Just a few months ago, she announced: "Our Constitution is one that *evolves*."[4] And for this reason, she said, "of course we look at foreign law."[5]

The notion of the Court "updating" the Constitution to reflect its own "evolving" view of good government is troubling enough. But the notion that this "evolution" may be brought about by changes in foreign law raises fundamental issues of democratic self-governance. What this means, in effect, is that a change in foreign law can alter the meaning of the United States Constitution. And this, I think, puts the finest point on what is really at stake here. When the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects its evolution,[6] it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution.*

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[2] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572-73, 576-77 (2003); Roper v. Simmons, 125 S.Ct. 1183, 1194, 1198-1200 (2005).

[3] Conversely, however, even those who reject original meaning and accept the notion of an "evolving" Constitution need not—and should not—deem contemporary foreign law relevant to its evolution. *See* John O. McGinnis, *Foreign to Our Constitution*, 100 N.W. L. REV. __(2005) (forthcoming).

[4] *Candid Camera with Supreme Court Justices*, MSNBC, April 22, 2005, http://msnbc.msn.com/id/7598231/ (emphasis added).

[5] *Id*.

[6] We should presume that if foreign citations are present, the Court is relying on them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. *See* Roper v. Simmons, 125 S.Ct. 1183, 1229 (2005) (Scalia, J., dissenting) "'Acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today."

Moreover, it might take only one foreign country to tip the scales and create a consensus. At the margin, a single country could make the difference. So in short, if constitutional interpretations are based even in part on foreign law, then under some circumstances, *a single foreign country would have the power to change the meaning of the United States Constitution.*[7]

And there is no reason why a foreign country could not do this self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment *in the United States*.[8] Yet surely it would come as a shock to the American people to imagine the French Parliament deciding whether to abolish the death penalty—not just in France, but also in America.

After all, ending foreign control over American law was the primary reason given for the Revolution in the Declaration of Independence; as House Resolution 97 recites, the Declaration's most resonant protest was that King George III had "subject[ed] us to a jurisdiction foreign to our constitution."[9] After the Revolution, it was not supposed to be this way. "We the People *of the United States* … ordain[ed] and establish[ed] th[e] Constitution,"[10] and we included a mechanism by which *we* could change it if necessary.[11] There is no reason to believe that foreign governments were also granted a free-standing power to change the meaning of the United States Constitution.[12] As Chief Justice Marshall declared in another context:

> To impose on [the federal government] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might

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[7] See, e.g., *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005) ("The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."). *But see id*. at 1228 (Scalia, J., dissenting) ("The Court has … long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War … a legal, political, and social culture quite different from our own.").

[8] *See* Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

[9] THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration protests further:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.
> To prove this, let Facts be submitted to a candid world.
> He has refused his Assent to Laws, the most wholesome and necessary for the public good.
> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Id.

[10] U.S. CONST. pmbl. (emphasis added).

[11] *See id*. art. V.

[12] *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005).

> disappoint its most important designs, and is incompatible with the language of the constitution.[13]

This is what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with basic principles of democratic self-governance reflected both in the Declaration of Independence and the Constitution itself. The issue is thus a very important one, and all the more important today with a Supreme Court nomination pending. The Committee is to be commended for addressing it here.

II. Separation of Powers and Interbranch Constitutional Dialogue

The Resolution focuses expressly on "judicial" interpretations. At a hearing before this committee last year concerning a similar Resolution, my colleague Professor Vicki Jackson suggested that "legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions."[14] She may well be right.[15] But the key point today is that House Resolution 97 does not give "directions" to the courts; it does not purport to bind them. It simply expresses the "sense of the House of Representatives" that judicial interpretations of the Constitution generally "should not" be based on foreign law. Because the Resolution does not purport to bind the judiciary, it cannot be objected to on separation-of-powers grounds.

Indeed, it should be applauded on these grounds. Each branch of government has an independent obligation to consider carefully the proper method for interpreting the United States Constitution. And it is entirely proper and commendable for one branch to inform another of its views on this topic. (One possible criticism of the Resolution as drafted is that it is *limited* to judicial interpretations; each branch of government is responsible for constitutional interpretation, and *none* of them should base its interpretation on foreign law.) This interbranch constitutional dialogue is eminently healthy for our system of separation of powers. If anything, I would urge Congress to let its opinions be known on such questions more often.

III. The Use of Foreign Sources in the Interpretation of Non-Constitutional Federal Law

Finally, it is worthy of note that the Resolution is limited to interpretation of the Constitution. Courts often rely on foreign and international law in the interpretation of other federal law as well, and it may be worth considering whether this is appropriate and when. Professor Dinh's testimony contends that foreign judgments are peculiarly

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[13] McCulloch v. Maryland, 17 U.S. 316, 424 (1819).

[14] *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 108th Cong. 18 (2004); *See also id.* at 18 ("Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system.").

[15] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002).

relevant to the interpretation of treaties, and I generally agree with him. A different question is whether such judgments may be relevant to the interpretation of federal statutes. Some statutes are passed precisely to execute non-self-executing treaties,[16] and the text of such statutes often track the treaties verbatim. In such cases, just as a foreign judgment may be relevant to interpret the treaty, it may likewise be relevant to interpret the implementing statute.

On the other hand, courts rely on international law to interpret federal statutes much more often than that. Indeed, international law is used to interpret federal statutes far more often than foreign law is used to interpret the Constitution. The primary reason for this is the famous *Charming Betsy* canon, which provides: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[17] According to one scholar, "the interpretive role of international law, as reflected in the *Charming Betsy* canon, is arguably more important than its substantive role …. [C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law."[18]

One of the primary rationales for the canon is that it reflects congressional intent—that Congress is extremely unlikely to wish to violate international law.[19] This was certainly a sound assumption in 1804, and it was probably a sound assumption for most of our nation's history. But one might ask whether this is still a sound assumption in light of "the radical changes in customary international law after World War II."[20] Customary international law now "can arise much more quickly,"[21] and it is also "less tied to state practice and consent."[22] And—perhaps the most "radical development in the whole history of international law"[23]—customary international law "increasingly regulates the ways in which nations treat their own citizens."[24]

Congress may wish to consider whether it still wishes to legislate against the background rule of the *Charming Betsy* canon, in light of this radical metamorphosis in customary international law.[25] If it decides that the answer is no—that it would prefer for its statutes to be read according to their plain terms without reference to international law—then it might consider a subsequent Resolution parallel to the present one, expressly rejecting the general use of international law in interpreting federal statutes.

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[16] *Cf.* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).
[17] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
[18] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482-83 (1998).
[19] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. a ("[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law.")
[20] Bradley, *supra* note 18, at 512.
[21] *Id*.
[22] *Id*.
[23] John J. Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUM. RTS. 205, 208 (1975).
[24] Bradley, *supra* note 18, at 512.
[25] *See id*. at 518-19 (offering "empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern").

Indeed, while mandatory congressional instructions to federal courts regarding *constitutional* interpretation may raise separation-of-powers concerns,[26] mandatory congressional instructions regarding *statutory* interpretation generally do not.[27] Thus Congress could, in fact, go further if it wished and *require* the federal courts to abandon the *Charming Betsy* canon. A simple statute to this effect might read as follows: "Acts of Congress shall only be interpreted by reference to foreign or international law if they expressly reference and incorporate such bodies of law." I believe that such a statute is worthy of serious consideration.

Conclusion

In conclusion, the Resolution rightly endorses a jurisprudence of "original meaning" and rejects the troubling notion that our Constitution can be made to "evolve" at the behest of foreign institutions. Its precatory framing as a "Sense of the House of Representatives" about how the judiciary "should" approach constitutional analysis does not violate separation of powers principles, but rather reflects a healthy step toward interbranch constitutional dialogue. My only suggestion is that Congress next address this same issue as it applies in the context of statutory interpretation.

I applaud House Resolution 97 and I thank the Committee for the opportunity to endorse it.

[26] *See supra* notes 14-15.
[27] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).